ground that the two persons in the taxi called upon by the prosecution had never mentioned that they were friends of the person who had hired the taxi. That is perfectly true, but it is equally true from the record that they were never asked. In my opinion the Magistrate was wrong in rejecting the evidence of the defence on the ground that he did so reject it.

Apart altogether from the rejection of the evidence of the appellant and his witness, I am of the opinion that the Magistrate was also wrong when he stated as a legal proposition that Exhibit P1 permitted the appellant to pick up passengers only at his authorised base at Scudai. In the statement construing the appellant's permit, the Magistrate appears to have been following the expression of opinion of the police corporal (PW 1) when he stated "According to P1 that the base is at police station Scudai — he can pick up passengers from Scudai to go to Gelang Patah or go to Johore Bahru. Defendant cannot pick up passengers at Gelang Patah. He can drop passengers at Gelang Patah".

A condition of the permit, a breach of which was apparently alleged, is condition 2 which reads:—

"2. The authorised vehicle shall operate from the following place which shall be deemed for all purposes to be the base from which it shall be operated . . ."

In the first place this condition must mean operate a hackney carriage. In my opinion it would not be a breach of the condition of the permit for the operator of the vehicle, at the request of the hirer, to take on additional non-paying passengers. Again, in my opinion, the construction placed by the police corporal and the learned Magistrate on the word "operate" is far too restricted. To my mind the appellant would have been operating from his base if he received a telephone call from a hirer to pick him up at a place other than the place named in the permit, and he would also be operating from that base if he received a message emanating from a charterer. I do not intend to provide a definition of the word "operate" but I am of the opinion that the condition, if it is being sought to impose one so stringent as that advocated by the police corporal and the learned Magistrate, should be redrafted. On the prosecution case the prosecution failed in my opinion to prove that the appellant had operated from any other place than his base stipulated in condition 2 above.

Accordingly the appeal is allowed, the conviction is quashed, and the fine, if paid, should be refunded.

Appeal allowed.

Solicitors: *Murugason & Co.*

LEE SWEE TEE v. PUBLIC PROSECUTOR

[A. Cr. J. (Rigby J.) April 4, 1960]

[Penang — Criminal Appeal No. 6 of 1960]

Gaming — Charge of "assisting in the management of a public lottery," Common Gaming Houses Ordinance, 1953.

Criminal Law and Procedure — Amendment of charge — Whether desirable at appellate stage.

In this appeal the appellant was convicted on a charge of "assisting in the management of a public lottery".

Held: there was no such offence created under the Common Gaming Houses Ordinance, 1953. The charge was bad in law since it disclosed no offence, and the trial and consequent conviction was a nullity.

On the facts the appellant could have been charged with the offence of "assisting in carrying on a public lottery". The Court considered whether at the appellate stage it ought to amend the charge. However in view of the provisions of the Criminal Procedure Code that before any amendment to a charge is made such amendment should be read and explained to the accused who should then be called upon to plead to the charge as amended, no amendment should be made.

Cases referred to:—

(1) *Chong Chee Pak* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 45.

(2) *Quek Ching Kim* v. *R.* [1956] M.L.J. 54.

MAGISTRATE'S CRIMINAL APPEAL.

A. Jayadeva for the appellant.

L. A. Massie (Deputy Public Prosecutor) for the respondent.

Rigby J. (delivering oral judgment): The learned Deputy Public Prosecutor, Mr. Massie, quite rightly concedes that on the authorities he cannot support the conviction in this case and that the appeal ought to be allowed. The result is singularly unfortunate since the appeal itself is wholly devoid of any merits on the facts.

The appellant was charged, together with two other persons, with assisting in the "management" of a public lottery, to wit, 100, 1,000, and 10,000 character lotteries, contrary to the provisions of the Common Gaming Houses Ordinance, 1953. Under the provisions of that Ordinance there is no such offence created as "assisting in the management of a public lottery". The charge, therefore, was bad in law since it disclosed no offence, and the trial and consequent conviction was a nullity. (See the case of *Chong Chee Pak* v. *Public Prosecutor* (1)). The appellant on the facts could, and should, have been charged with the offence created under the provisions of the Ordinance of "assisting in carrying on a public lottery". I have seriously considered whether in the interests of justice I ought not to amend the charge at this stage and, on the facts, convict the appellant of what would have been the correct charge of assisting in carrying on a public lottery. But the same point fell for consideration before Whyatt C.J.,

in the Singapore case of *Quek Ching Kim* v. *Reg.*[2] His Lordship in that case agreed with the attitude taken by Counsel for the Crown that having regard to the provisions of the Criminal Procedure Code before any amendment to a charge was made such amendment should be read and explained to the accused who should be called upon to plead to the charge as amended. His Lordship, agreeing with the view taken by Counsel for the Crown in that appeal, held that it was then too late to amend the charge so as to bring it within the provisions of the Common Gaming Houses Ordinance. In the result, unsatisfactory as it may be, I must hold that the trial and conviction in this case was a nullity and that the conviction must accordingly be quashed. The fine, if paid, must be refunded to the appellant.

Conviction quashed.

Solicitors: *Jayadeva & Zahir.*

THE MANAGER, SCUDAI ESTATE, JOHORE BAHRU v. NARAYANAN

[A. C. J. (Neal J.) April 6, 1960]

[J. B. — Civil Appeal No. 4 of 1959]

Master and servant — "Misconduct" — Continuance of work after warning — Dismissal without notice — Employment Ordinance, 1955, s.14(1).

Labour law — Labour Officer hearing cases — Conduct.

In this case the point in issue was whether or not the appellant as the employer by virtue of section 14(1) of the Employment Ordinance, 1955, was entitled to dismiss the respondent without notice for misconduct.

Held: (1) a master, with full knowledge of a servant's misconduct, electing to continue him in his service, cannot subsequently dismiss him for the offence which he had by his warning and subsequent employment condoned;

(2) however, in this case, there was clear evidence of fresh misconduct subsequent to the last warning which not only in itself constituted grounds for instant dismissal but revived the misconduct which had been condoned.

Observations on conduct of hearing of labour cases.

Case referred to:—

(1) *Harmer* v. *Cornelius*, 141 E.R. 94.

APPEAL from the decision of the Labour Officer, Johore Bahru.

Ong Swee Keng for the appellant.

Respondent in person.

Neal J. (delivering oral judgment): This is an appeal from the decision of the Labour Officer, Johore Bahru, given on the 22nd October, 1959, when on the complaint of the present respondent he made an order in favour of the respondent against the appellant for the payment of a sum of $14.97, being wages due to the respondent, and a sum of $90, being indemnity in lieu of one month's notice.

In the course of his grounds of judgment the Labour Officer held that the appellant could (I emphasise the word could and not should) "have given a month's notice to terminate the complainant's service instead of having given several warnings". Reading the whole of the grounds of judgment and the issues which the Labour Officer himself fixed and the evidence on the record, it is obvious that the Labour Officer had misunderstood the point in issue.

The only point in issue in this matter is whether or not the appellant as the employer, by virtue of section 14(1) of the Employment Ordinance, 1955, was entitled to dismiss the respondent without notice for misconduct. The onus of proving misconduct to justify dismissal without notice rests upon the employer. What amounts to misconduct is adequately set out in the following words of Willes J. in the judgment of the Court of Appeal in *Harmer* v. *Cornelius*[1] (at p. 98): "The failure to afford the requisite skill which had been expressly or impliedly promised, is a breach of legal duty, and therefore misconduct".

In this particular case there can be no doubt that the wounding of the trees other than by accident would constitute a breach of the skill required from an experienced tapper and, except in isolated instances, would constitute misconduct. On the record there is a statement by the respondent that trees were wounded by him, the number being unknown to him, but he alleged that the wounding was not such as would have reduced the quantity of latex to be received from the trees during their life-time. The appellant, however, alleged extensive and dangerous wounding. He stated that from approximately the month of January, 1959, he had warned the respondent culminating in a warning on the 25th August that unless the respondent's work improved he would have to look for a job elsewhere. This evidence was corroborated by the appellant's Conductor, a Chinese.

In view of those warnings following conduct of the respondent which could adequately be described as coming within the definition of "misconduct", I have to consider the effect of a continuation of work after those warnings. It is clear law that a master, with the full knowledge of a servant's misconduct, electing to continue him in the service, cannot subsequently dismiss him for the offence which he had by his warning and subsequent employment condoned. On this aspect of the case the record was extremely sparse. The last warning was on the 25th August. As to any misconduct subsequent thereto the respondent stated that rubber trees were not wounded during the month he was dismissed. Even if his words were accepted, they did not cover the period of employment from the 25th August to the end of that month. I emphasise "even if his words were accepted". The evidence by the appellant and his witness is in general terms. The evidence of the appellant on the record is that "in spite of the advice and warnings, he (the respondent) failed to improve